No. 2618.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

K. V. KRUSE and R. BANKS, co-partners doing business under the firm name of "KRUSE & BANKS SHIPBUILDING COMPANY" (a corporation), on behalf of themselves and their underwriters,

Appellants,

vs.

M. J. SAVAGE, EDW. J. MORSER, JAMES H. HARDY, Inc., JAMES H. HARDY, HANS MICHAELSEN, MRS. F. RULFS and DR. ALEXANDER WARNER, claimants of the American steamer "Hardy," her tackle, apparel and furniture,

Appellees.

Reply Brief for Appellees.

W. S. ANDREWS,
Proctor for Appellees.

Filed this.....day of November, 1915.

....., Clerk.

By....., Deputy Clerk.

THE JAMES H. BARRY CO.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

K. V. KRUSE and R. BANKS, co-partners doing business under the firm name of "KRUSE & BANKS SHIP-BUILDING COMPANY" (a corporation), on behalf of themselves and their underwriters,

Appellants,

vs.

M. J. SAVAGE, EDW. J. MORSER, JAMES H. HARDY, Inc., JAMES H. HARDY, HANS MICHAELSEN, MRS. F. RULFS and DR. ALEXANDER WARNER, claimants of the American steamer "Hardy," her tackle, apparel and furniture,

Appellees.

No. 2618

REPLY BRIEF FOR APPELLEES.

STATEMENT OF FACTS.

At the solicitation of appellants, the steamer "Hardy" through her master, Hans Michaelsen, undertook for the sum of $200 to tow a barge, owned

and built by them, from Coos Bay to San Francisco, with the understanding, according to appellees, but denied by appellants, that the towage was to be at appellants' own risk. The lower court found that the hawser for the tow was furnished by appellants. Captain Michaelsen carefully examined the hawser before sailing and found it to be a 10-inch rope more than 600 feet long and apparently without defect and easily capable of standing the strain to be placed on it. The appellants also furnished and equipped the barge with a lantern and oil to burn therein. Counsel state as an "undisputed fact" that the lantern was a "proper light," but in view of the fact that it went out within two hours after it was lit (and as counsel would contend, within the harbor), this statement is open to question.

The "Hardy" weighed anchor and started from Coos Bay on September 5, 1913, about 5 P. M., towing the barge which, as counsel say, was "stanch, strong and seaworthy and an especially easy barge to tow." Just as the "Hardy" was crossing the outer bar the light on the barge, furnished and lit by appellants, went out. While there was some evidence that this occurred at 6:15 P. M., the exact time was not firmly established, but the lower court was convinced that the *place* where the light went out was at the outer bar. The light was not again relit because in Captain Michaelsen's judgment, under the conditions existing, an attempt to do so in the ship's

boat would place the crew in great danger of drowning. The lower court declared that the evidence supports the master's judgment, and refused to review the Captain's action in this regard.

From the time the light went out on September 5, 1913, until 12:40 A. M. on September 7, 1913, the "Hardy" ran before a northwest wind, towing the barge, whose presence could always be distinguished by the foam that shot up from her prow. Between 12:20 A. M. and 12:40 A. M. on September 7, 1913, the hawser parted and the barge went adrift. The loss was discovered about 12:40 A. M. and in spite of her heavy deckload the "Hardy" was, by skilful seamanship, turned about and headed slowly north. All night long a look-out was kept for the barge. When daylight came, about 6 A. M. of September 7th, the "Hardy," being then north of where the barge had gone adrift, was headed south, and a vigorous search began. A low drifting fog greatly handicapped the search. The "Hardy" zig-zagged in and out, running slowly south, keeping a sharp lookout, but without catching sight of the barge, until 11:15 A. M. on September 7th, when Captain Michaelsen felt certain that he was south of the barge, as in fact he was. Then having only 60 barrels of fuel oil left and having still about 145 miles to go, the master determined that prudence demanded that he proceed to San Francisco. The "Hardy" arrived in San Francisco on September 8, 1913, having been 61

hours on the voyage. The barge drifted ashore near Caspar and was later salved by the steamer "Brunswick" and brought to San Francisco.

ARGUMENT.

THE QUESTION OF THE BURDEN OF PROOF.

Before analyzing and discussing the evidence in this case, it might be well to first consider the accuracy of the statement of counsel for the appellants that the burden of proof in this case rests upon appellees to show that they were not negligent in view of the admitted fact that the tow was damaged when she had no one on board. It is elementary that a tug is neither a common carrier nor an insurer and is only bound to use ordinary care. "Unlike the case of "common carriers, no presumption of negligence "arises on the part of a tug from the mere fact of "an injury to her tow, and the burden rests upon the "tow to prove that its loss or injury was due to neg-"ligence on the part of the tug in order to render the "latter liable therefor" (38 *Cyc.*, 585). And the rule is not changed where the tow is damaged when no one is on board her. To contend that such is the case is to show a misapprehension of what constitutes the burden of proof. It has now been clearly demonstrated by such masters of the law of evidence as Thayer and Wigmore that the burden of proof in an action rests upon him who has the affirmative of

the issue and that this burden of proof never shifts. The plaintiff must sustain the allegations of his complaint or libel by the preponderance of the evidence. However, the "duty of going forward," as Professor Thayer called it, or the burden of the evidence, does shift from side to side. Where the plaintiff establishes a prima facie case either by the operation of a presumption or by some evidence, it devolves upon the defendant to produce sufficient evidence to combat the case presented. The duty of going forward shifts to him. Then the plaintiff must again produce evidence to meet that of the defendant, for the ultimate burden of proof is always on him and he must overcome the impression created by his opponent's testimony in order to secure a verdict.

Now it may well happen that certain facts when testified to or admitted will raise a prima facie case in favor of the plaintiff and relieve him of the burden of going forward, but not of the burden of proof. As stated in the article on Towage, 38 *Cyc.*, 585, "in "some cases the undisputed circumstances of the dis- "aster may constitute a prima facie case of negli- "gence, and put the tug on the duty of explanation." The most that counsel for appellants could accurately claim from the fact that the tow was lost when she had no one representing appellants on board, would be that it established a prima facie presumption that the tug had been negligent and that the latter must give some explanation of the accident to avoid an ad-

verse judgment. This is all that *"The Seven Sons,"* 29 Fed., 543, cited by appellants, holds. In that case a flat-boat was damaged when being towed on the Monongahela River. The *libelant proved that there was good boating stage of water during the trip and no apparent cause for the accident.* The respondents remained silent and attempted no explanation. There was no one representing the libelants on board the barge. It doesn't appear whether or not there was anyone on the barge representing respondent. Under these conditions the court held the circumstances of the disaster constituted a prima facie case of negligence and put on the tug the duty of explanation or of going forward. The burden of proof, however, never shifted from the libelant. As the court in that case said:

> "As the case stands, there is no evidence to show the cause or manner of the accident, or what precautions were taken to avoid it, although these are matters peculiarly within the knowledge of the owners of the tow-boat and their employees. Under the proofs, then, what should be the judgment of the court?
>
> "The owners of a tow-boat, it is true, are not common carriers, and they are responsible only for ordinary care, skill, and diligence. But a bailee subject to that degree of responsibility only, is yet bound to show how the goods intrusted to him were lost or damaged, before he can throw upon the bailor the burden of proof of negligence."

Nor do any of the cases cited in 38 *Cyc.,* 585, note

64, referred to by counsel, hold any more than that certain circumstances may put upon respondent the duty of explaining a presumed negligence arising from the fact itself. But such a situation would not relieve the appellants of the burden of proof; that is, the burden of proving that the barge was lost through the negligence of appellees. As said by the Court in

The Bronx, 86 Fed., 808:

> "The burden of proof does not shift during the trial; but the introduction of evidence may give rise to a presumption of fact, and thus put upon a party the burden of explaining a situation from which, in the absence of explanation, his liability would be presumed."

Further, the fact that the tow was lost at a time when she had no one on board does not alone constitute a prima facie case of negligence on the part of appellees, and the cases cited by counsel for appellants do not sustain such a position. Other and additional elements predicating negligence must exist. The mere fact that an unmanned barge is lost can raise no presumption of negligence, for the loss might be due to a great storm or some other unavoidable cause. Furthermore, the facts constituting the alleged negligence are disputed in this case. Appellees claim that appellants furnished the hawser and that the towage was undertaken at appellants' own risk; that the lamp was not relit because of danger to the sailors; that earnest endeavors were made to find the

barge and the search discontinued only on account of the safety of the tug. In view of this conflict in the evidence as to the facts constituting the alleged negligence, not even a prima facie case could rise against appellees. As the Court said in the case of

Pederson vs. *John D. Spreckels,* 87 Fed., 938:

> "In cases where no questions are raised as to what caused the accident or the injury, and the circumstances are of such a character as to show that the thing which did happen could not have occurred unless there was negligence upon the part of the person having charge of it and control of such thing, then the presumption contended for would apply. But it would be a strange construction of the rule to apply it to a case like the one under consideration where all the facts as to the cause of the accident are in dispute and nothing occurred which of itself tended to show that the tug was at fault."

And again as said by the Court in the case of

Baltimore, etc. Barge Co. vs. *Knickerbocker Steam Towage Co.,* 170 Fed., 442:

> "When the tugs have accounted for the accident by showing a special emergency and have definitely described movements not improbable and not necessarily inconsistent with good seamanship, all presumption of negligence from the mere fact of the accident disappears, and the burden is cast upon libelant to establish negligence by a clear preponderance of proof."

The burden of proof is therefore upon appellants

to demonstrate that the barge was lost through the negligence of appellees and this burden of proof never shifts.

With this preliminary as to where the burden of proof rests, let us now consider the points wherein appellants contend appellees were negligent. Counsel for appellants maintain that appellees were negligent in four particulars, any one of which was responsible for the damage to the barge. *First:* he contends that the hawser was defective and that appellees are responsible for any defect in the hawser. *Second:* Counsel contends that appellees were negligent in not re-lighting the light on the barge after it went out. *Third:* That appellees failed to discover the fact that the barge was adrift as soon as they should. *Fourth:* That appellees made an insufficient search for the barge and carelessly abandoned her. Let us discuss these contentions in the order named.

ARE THE APPELLEES RESPONSIBLE FOR THE BREAKING OF THE HAWSER AND THE CONSEQUENT LOSS OF THE BARGE?

In the first place it must be remembered that the steamer "Hardy" was not engaged in the towing business; it was and is a lumber schooner plying between Coos Bay and San Francisco. It was not equipped with the appliances that are to be found on a tug regularly engaged in the business of towing. It did not have a towing drum nor was it equipped with

hawsers such as tugs carry. The appellants had to get their barge towed to San Francisco, and naturally desired to have that done as cheaply as possible, especially in view of the fact that they were selling the barge at a price much below the trade price in San Francisco in order to get the business (pp. 68, 72). The steamer "Hardy" was making regular trips between Coos Bay and San Francisco, and therefore offered a cheap means of getting the barge towed south. Appellants were aware that the steamer "Hardy" was not engaged in the towing business, and in soliciting her to tow their barge they were accepting whatever equipment she might have. The steamer "Hardy" did not possess a hawser and we think the testimony leaves little room for doubt but that the lower court was right in finding that the hawser was furnished by appellants. Though Mr. Banks denies that he ever applied for the hawser to the Simpson Lumber Co. for the steamer "Hardy," yet he admits that he told Captain Michaelsen that "he could secure a line from the Simpson Lumber Co.,—that they had tow-lines there" (p. 75). On this subject Captain Michaelsen testifies as follows:

> "Q. Before you took the tow, what if any conversation did you have with Mr. Banks upon the subject? A. Mr. Banks was to furnish everything, tow-lines and lights and everything.
>
> "Q. Just give the conversation, so far as you can remember it, that led up to that conclusion or agreement that you speak of; how did he approach you, what did he do and say? A. Well, the first

we spoke of it was about three trips before; we made three trips I think while he was building the barge. He asked me how much I would charge him for towing down the two barges, and at that time I told him that I did not know for sure how much I would charge, and I said I would let him know later. I saw Mr. Banks up there every trip I was up there, and the following trip I told Mr. Banks that if he would furnish everything I would tow them down for $500.00. Mr. Banks told me that was too much, he thought that was too much. Well, I told him, 'I don't care, because I am going to .no trouble to get a tow-line.' So he said he could get a tow-line from Mr. Simpson—Mr. Banks did. We verbally agreed that I would tow the two barges, either take two or the one, and I said to Mr. Banks, 'We will charge $500.00, you can count $300 for the first one and $200 for the small one, or else $250 apiece to tow them down,' and he was to furnish the tow-line, to get the tow-line from Simpson and furnish the lights and everything" (pp. 105, 106).

Just before starting to tow the barge, Captain Michaelsen met Edgar Simpson, who lent the hawser, and said to him: "Are there going to be any charges against me on that tow-line for Kruse and Banks?" Mr. Simpson replied, "No, if there is anything to be charged it will be up against the shipyard of Kruse and Banks" (pp. 107, 118).

The fact that Kruse & Banks were furnishing the line and not the steamer "Hardy" is strongly supported by the testimony of L. F. Falkenstein, an employee of Edgar Simpson and a disinterested witness.

Mr. Falkenstein testifies that he had often talked over the telephone with Mr. Banks, and knew his voice, and that shortly before the steamer "Hardy" left Coos Bay with the barge in tow he had a conversation with Mr. Banks over the telephone relative to securing a hawser from the Simpson Lumber Co. for the Steamer "Hardy." In his deposition Mr. Falkenstein said:

> "I was in the office of the Simpson Lumber Co. when I answered the telephone. He (Mr. Banks) asked if the 'Hardy' could have a tow-line to tow the barge to San Francisco and I told him that the tow-line was in the office, but he would have to see Mr. Edgar Simpson about the loan of it. That is, the tow-line was in the building not in the office" (p. 43).

On cross-examination Mr. Falkenstein was asked:

> "Q. Have you any way of fixing the conversation that you had with Mr. Banks, relative to the tow-line, as to which barge he was talking in regard to? A. No, I have not.
> "Q. You don't know whether it was the barge the 'Hardy' towed or the other barge. A. This barge that this conversation was in regard to, was the barge that the 'Hardy' towed, because he asked for *the tow-line for the 'Hardy'*" (p. 45).

Again Mr. Falkenstein was asked:

> "Q. Do you know that the tow-line was taken within two days after that conversation?
> "A. About that time.
> "Q. And was that the trip of the 'Hardy' in

which she lost a barge belonging to Kruse and Banks?

A. Well, I do not know that she lost two, but the time I saw her going out I know that she lost that barge, from hearing of it afterwards.

"Q. And when was the telephone communication which you had with Mr. Banks with reference to the time that you saw her go out?

"A. A few days before that.

"Q. How long before?

"A. It wasn't over two days, I don't believe" (p. 46).

The deposition of Edgar Simpson was taken, and he was asked:

"Q. What do you know about the tow-line which was used by the steamer 'Hardy' in towing that barge?

"A. I know that the line belonged to the Simpson Lumber Co.

"Q. How was it obtained from the Simpson Lumber Co., and who obtained it?

"A. The ship yard telephoned to our office and asked permission for the use of the line. Mr. Falkenstein answered and told them it was all right if I was willing. He afterwards mentioned it to me and I said it was all right.

"Q. Did you have any conversation with the master of the steamship 'Hardy' before he sailed on that trip with reference to the tow-line?

"A. Yes.

"Q. What was that conversation?

"A. I met him somewhere and he asked me if I was going to charge him for the use of the line. I told him no, that the ship yard would have to pay.

"Q. To whom did you understand that the Simpson Lumber Co. was loaning the line?

"A. Kruse and Banks Ship Yard" (pp. 47, 48, 49).

"Q. If it had been a subsequent barge that had been towed by some other vessel, then you would not have told the master of the steamship 'Hardy' that you wanted to charge this particular tow-line to Kruse and Banks?

"A. No, certainly not.

"Q. You had known by reason of your conversation with the master of the steamship 'Hardy' that the tow-line in question had to do with the towing of this particular barge by the steamship 'Hardy?'

"A. That is my impression that this is the barge it was for" (pp. 48, 49).

The testimony of Captain Michaelsen, L. F. Falkenstein and Mr. Edgar Simpson is all to the effect that the hawser was borrowed from the Simpson Lumber Co. by Kruse & Banks. Mr. Banks alone contradicted this testimony. In view of the fact that both Mr. Falkenstein and Mr. Simpson are disinterested witnesses and that a perusal of the testimony of Mr. Banks will show that his recollection was not very certain, and further, that the burden of proof is upon appellants to establish that appellees furnished the hawser, we believe we can correctly state that the weight of evidence shows that the hawser was furnished by appellants.

Counsel maintain that the evidence shows that appellees furnished the hawser, and then realizing the weakness of this contention, stated that in any event the matter is of no importanre for the tug

is responsible for the quality of the towing lines. Whether immaterial or not, the evidence amply justifies the finding of the lower court that appellants themselves furnished the hawser, and appellees are thereby relieved from any responsibility that could be said to arise from having furnished the towing line. *"Re Moran,"* 120 Fed., 556, cited by counsel to support the proposition that the tug is responsible when the tow furnishes the line, is not in point, for in that case the tug had sufficient hawsers of its own and preferred to use the tow's line. On the other hand, it was held in *"The Echo,"* 8 Fed. Cas. No. 4263, that a tug was not responsible for a defective hawser furnished by a tow. In that case

> "A brig was towed out from a pier by a tug by means of a hawser furnished by the brig. The tug controlled the brig, whose master and crew took no part in the work except as directed by the master of the tug. The hawser parted and the brig went foul of another vessel and received damages, to recover which she filed a libel against the tug."

Judge Blatchford said:

> "Assuming it to be true, as alleged in the libel, that, at the time of the injury to the brig, the brig was under the sole control of the master and crew of the tug, and that the master and crew of the brig took no part in the work of moving her, except as they were directed by the master of the tug, I am not satisfied that the libelants have made out the charge of libel; that in moving the brig, those navigating the tug conducted the business so carelessly, negligently, and improperly, that the brig

> received the injury which happened to her. The weight of the evidence is, that it was the parting of the hawser between the brig and the tug which caused the rigging of the brig to foul with the yard of the bark. For the condition and strength of the hawser the tug was not, as between herself and the brig, responsible in the event of injury to the brig from the weakness of the hawser. The brig must bear herself all loss occurring to herself from the parting of such hawser, as it is not shown to have parted through any negligence on the part of the tug."

However, let us assume that it is immaterial who furnished the line and that the general law is, as stated by counsel, "that it is the duty of the towing "steamer, and not the tow, to see that the towing lines "are sufficient in length and quality." It is also well established that the tug is not a common carrier or insurer and is only bound to exercise reasonable skill, care and diligence (38 *Cyc.*, 563). The tug can only be required to use ordinary care in equipping herself with towing appliances and cannot be held liable for some hidden defect in the hawser which could not be found by the use of ordinary care and diligence (*Re "Moran,"* 120 Fed., 556). As a matter of fact, defects often exist in hawsers which even experts cannot detect. Counsel themselves admit that they do not "make the contention on this appeal that the "'Hardy' was negligent in the use of the hawser in "question, for it was apparently a sufficient one" (App. Brief, p. 10). The evidence in this case shows *without contradiction* that Captain Michaelsen exam-

ined the hawser from end to end before using it, and he testified that after so examining it he was "satisfied it was perfectly good rope for that tow" (p. 119). The hawser was a 10-inch line and was over 600 feet long (p. 129). Such a hawser should ordinarily be strong enough to tow a barge three times the size of the one involved in this action. Indeed, as one of the appellants himself testified, the barge was exceptionally easy to tow on account of her ends being very much sloped (pp. 66, 68).

In view of these circumstances and the examination of the hawser made by Captain Michaelsen, it is difficult to see in what particular Captain Michaelsen failed to observe ordinary care in using Simpson Co.'s line, even though it be assumed that appellees were furnishing the hawser. And it seems to us that much less can appellees be held responsible for any hidden defect in the hawser when, as the evidence clearly shows, the hawser was procured and furnished to the "Hardy" by appellants.

There being no negligence chargeable to the "Hardy" in using the tow's hawser, and counsel so admits (App. Brief, p. 10), appellees can only be held responsible on the theory that the tug warranted the strength of the line and that if it broke, appellees would be liable for any damage resulting therefrom. Such a theory is obviously untenable. A tug is only required to use ordinary care in equipping herself with towing appliances. A tug is not liable as a

common carrier or an insurer (38 *Cyc.,* 562), and it is therefore difficult to see how she can be held to be an insurer of her equipment. As the Court said in that case so strongly relied upon by appellants, and entitled:

"The Moran," 120 Fed., 566:

> "Neither the tug nor her owner are liable on account of the hawser, or the use made thereof. It is urged that the owner guarantees the equipment of the tug; that is, that he engages absolutely that each line, rope, etc., when properly used, shall bear without breaking the strain made necessary by its office, caused by the ordinary violence of wind and weather, and that he will be liable for any damages happening under such conditions approximately from an unworthy sea line. *It would be interesting to discover by what analogy or reasoning a tower not held to be a common carrier* (*The Syracuse,* 79 U. S., 167, 20 L. ed., 382; *The Margaret,* 94 U. S., 494, 497, 24 L. ed., 146; *The J. P. Donoldson,* 167 U. S., 603, 17 Sup. Ct., 951, 42 L. ed., 292) *is regarded as an insurer of his tug's equipment."*

Counsel seem very much vexed because the lower court stated that the parting of the hawser "was the real cause of the loss of the barge." Counsel construes this statement as a finding that the parting of the hawser was the proximate cause of the loss of the barge. Assuming this construction to be correct, we can see no fault in the finding. Many definitions of "proximate cause" have been given. It has been defined as "an act which directly produced or con-

curred directly in producing the injury" (32 *Cyc.*, 745). To us it would seem that the breaking of the hawser was the act which directly caused the loss. But were it otherwise, counsel's objection seems of little importance in view of the fact that the Court expressly found that appellees were not negligent, either before or after the breaking of the hawser, in any of the particulars charged.

At this juncture, while not a matter of importance in view of the foregoing, it might also be pointed out that Captain Michaelsen testified, though contradicted by Mr. Banks, that it was agreed in the verbal contract of towage that appellants were to furnish the "tow-lines, lights, and everything," and that appellees were to "take no risks" (pp. 106, 107). In spite of the aspersions cast by appellants' counsel on the veracity of Captain Michaelsen for his testimony in this particular, we believe the circumstances support the truth of his testimony. Appellants did furnish the light, oil and bridle (p. 78), and the lower court believed the testimony of Captain Michaelsen that appellants furnished the hawser, the testimony of Mr. Banks to the contrary notwithstanding. It would seem natural that Captain Michaelsen should stipulate against the assumption of any risk in undertaking the tow, in view of the fact that he was not in the towing business, that the vessel was not equipped for such work, and that he was undertaking the tow at a low figure.

In a word, then, no blame or liability can be placed on appellees for the breaking of the hawser and the consequent loss of the barge, because:

First: The evidence shows that the hawser was furnished to "The Hardy" by the appellants.

Second: Because the appellees, whether they did or did not furnish the hawser, at any rate did not warrant its soundness and cannot be held liable as a common carrier or an insurer. Even though Captain Michaelsen's stipulation that appellees were not to assume any risks was ineffective, as stated by counsel, still appellees were required merely to exercise ordinary care, and the evidence amply shows, without counsel's admission, that Captain Michaelsen was in no degree negligent in using the Simpson hawser. Not being an insurer or common carrier, and having fulfilled the duty laid upon her of exercising ordinary care, the lower court was clearly right in finding "that the 'Hardy' was not responsible for the parting of such hawser."

SHOULD APPELLEES BE HELD LIABLE FOR DAMAGES BECAUSE THE LAMP OF THE BARGE WAS NOT RELIT?

This question involves two considerations: first, was the failure to relight the light on the barge a proximate cause of the loss of the barge; second, did appellees fail to use ordinary care in not relighting the lamp?

Counsel for appellants contend that the failure of Captain Michaelsen to relight the lamp on the barge after it went out at the bar was gross negligence and was a direct and proximate cause of the loss of the barge. They apparently consider this omission as more favorable to them than the use of the hawser by appellees, for they characterize this omission as appellees' "first main fault," and pass over the question as to negligence in the use of the hawser with the remark that "it really has little bearing on the case." To us it seems that the failure of Captain Michaelsen to relight the lamp is a matter of little importance in this case. Counsel assume that if the lamp had been relit on September 5th or on September 6th, that it would have been burning when the hawser broke and would have continued burning until daylight on September 7th, and so the tug would have been able to find the barge. We realize that it is idle to enter into the field of conjecture, but it does seem to us that it does not at all follow that the lamp would have been burning when the hawser broke and thereafter, even if it had been relit on September 5th or September 6th. It might well have gone out simultaneously with the breaking of the line, or during the night of September 6th when it could not be relit. Indeed, the fact that it went out when crossing the bar would seem to indicate that it might do such a thing again. While it is true that if the lamp had continued to burn after the hawser broke Captain

Michaelsen might have been able to locate the barge, it doesn't at all follow that the lamp would have been burning when the rope broke if it had been relit after it first went out. In other words, while it *may be* that the failure to relight the lamp on September 5th or September 6th prevented Captain Michaelsen from finding the barge, it isn't *necessarily* true that such omission was a proximate cause of the loss, for the lamp might have gone out at any time during the night of September 7th and the same result would have happened.

But assuming that the lamp, if it had been relit on September 5th, would have continued burning through the night of September 7th, and that this light would have enabled Captain Michaelsen to locate the barge, we fail to see wherein Captain Michaelsen was in any way careless or negligent in not relighting the lamp. The light went out as the steamer "Hardy" was crossing the outer edge of the bar (p. 107). The attempt of appellants to show by evidence of the time taken by the "Hardy" to reach the bar, that the light went out when the barge was in the harbor, was very far fetched and requires little or no reply. The place where the light went out would naturally be more certainly and accurately fixed in the minds of the officers of the steamer "Hardy" than the minute when it occurred. A number of witnesses testified that the light went out as the tug was crossing the bar, and this testimony is

uncontradicted (Capt. Michaelsen, p. 107; A. Hultgreen, p. 143; Rudolph Sanne, p. 161).

It would have been very imprudent and probably impossible for Captain Michaelsen to have attempted to relight the lamp at the time when it went out. As Captain Michaelsen answered in reply to a question as to why he did not then lower a boat and relight the lamp:

> "The wind was too swift and the sea was too strong and night-time was setting in, it was getting dark. By the time I got clear off-shore in safety with my vessel, it was dark, and it was not fit to lower a boat to board that barge, it was not fit to board the barge in safety.
>
> "Q. Generally, whether it was dark or daylight, what would be the danger of attempting to board that barge with the sea running?
>
> "A. Well, there would be the danger of drowning some of the boatmen.
>
> "Q. Explain in detail, if you can, how the barge acts on the sea, with a small boat coming alongside of her?
>
> "A. It is a flush-bottom barge, and with a strong northwest sea running, it will come up on top of one sea and it will roll right over and set right down; if you are down in the sea, she is liable to roll half way over you and list over you; she was flush, and if she hits you you go out, there is nothing to hold fast to. There is no chance at all. She would smash a little boat up and drown the men. They would be in danger. In my judgment, I would not put any man out to face that barge in that way, and I didn't think I should try to drown any of the men to get a light on the barge.

"Q. Was there anybody on the barge to receive a line, or anything of that sort?

"A. No sir, nobody was on the barge" (p. 109).

Again on cross-examination Captain Michaelsen testified:

"Q. But you didn't let down a boat to relight the light on the barge?

"A. No; I judged the sea a little heavy and the wind a little too strong to lay around at night time and try to put men out in the night time and try to get around that barge. That was the way it appeared to me that night as far as I could see. The way the wind and the sea appeared to me, it was not proper at all to try to get any men to go in a small boat and try to board the barge in the middle of the night in the dark, because it was a dark night.

"Q. You had a good working boat, did you not?

"A. Yes, I had a good working boat.

"Q. Could you have gone under the lee of the barge in perfect safety?

"A. The lee of the barge is just as bad as the weather side of the barge. There is no keel on this barge. It is not like a vessel. I feel satisfied I could lower a boat on my own vessel and come around to a deep sea vessel, that is, if there were men around who could assist us with a line. But that night when we had to go alongside the barge and get ahold of it with your hands, and if you got hold like that you would slip off and if you did that and came up on one of the seas and if you happened to come up on the sea, you would knock over the boat; it does not take much to break over a little row-boat or capsize it.

"Q. Your men could all swim could they not?

"A. I never examined them as to that. I am not going to try and risk the men to be swamped out of the boat, because then I am up against the government myself. I am not supposed to go that far. I am supposed to use a sound judgment in those cases. And when it goes that far that those men have to go out and swim, then I am risking their lives, and I am taking chances either that they will drown or make it. They are human beings, you know" (pp. 124, 125).

A. Hultgreen, the first officer of the steamer "Hardy" and an officer with 21 years' sea experience, said:

"In my opinion it was pretty near impossible to board that barge at any stage from the time we went over that bar until we lost her, and it would have been a needless risk of life and a needless risk of getting a boat swamped to get anywhere near her the way the barge was working in the sea; she would lift up and show half her bottom above the water, and she would jump down again and she would go from one sea to the other, and as the sea increased, she would jump from sea to sea; every sea she would make a jump" (p. 143).

The testimony and argument which counsel for appellants advance to meet the foregoing testimony is inaccurate, specious and flimsy. Counsel seize every opportunity to cast reflections on the veracity of appellees' witnesses, and even go so far as to intimate that claimants have fraudulently tampered with their books and endeavored to frame up their case. We most indignantly deny the charge. The Pilot House Log Book put in evidence is nothing more than a

scratch book (p. 131). Captain Michaelsen frankly admitted making erasures in this book, and a cursory examination of it by the Court will show many other erasures and changes scattered throughout. Appellants rely on such testimony as that of Banks that when the barge left the weather was good; that of J. Dunson, lighthouse keeper at Coos Bay, that the weather was not bad on September 5th; that of Captain Britt that conditions at the bar were moderate and that a boat could have been launched and the light relit without risk; that of Messrs. Rosenthal and Davenport that Captain Michaelsen did not tell them the weather prevented him from relighting the lamp!

Now claimants have never claimed that a storm was raging as the steamer "Hardy" crossed the bar; they do say that a boat could not be lowered at the *bar* without great danger of being swamped and that soon thereafter it became dark and the wind and sea increased. The testimony of Banks that the weather was good and of J. Dunson that "it wasn't bad" are not at all contradictory to the testimony of claimants' witnesses. While appellants' witness, Captain Britt, said that *"as far as he knew"* a boat could have been lowered from the steamer "Hardy" at sea off Coos Bay; he also said: "A boat could have been launched " in the lower bay, but *probably not on the bar*—can't " call that the lower bay" (p. 27). Furthermore, Captain Britt testified that a fishing boat was swamped on September 5th at about 7 P. M. (45 minutes after

the light went out on the barge) while it was trying to cross this bar (p. 30). The testimony of Messrs. Rosenthal and Davenport that Captain Michaelsen did not tell them that the wind and sea prevented him from lowering a boat is obviously of little weight even if true. It may be very true that Captain Michaelsen thought that the barge was safe enough considering its small size, its easy riding qualities and the size of the hawser. Captain Michaelsen, however, testifies that he did tell Messrs. Rosenthal and Davenport that the weather did not permit the lowering of a boat safely, and he is corroborated by the engineer who overheard the conversation (pp. 155, 157). There has certainly been no evidence adduced by appellants on this phase of the case of very much weight.

Nor could Captain Michaelsen return into the harbor in order to relight the lamp.

> "A. The light went out when we were crossing the bar, on the outer edge of the bar.
> "Q. On the outer edge of the bar?
> "A. Yes.
> "When you arrived at that point, could you have turned around and gone back into the inner bay?
> "A. No, sir.
> "Q. Why not?
> "A. We would lose the ship.
> "Q. Detail the reasons why?
> "A. The tide was just commencing to ebb already and there was just enough water for me to get out on top high water; against an ebb tide I could not get in with that ship, I would hammer the bottom out of it. I could feel the bottom

of the bar as I went out, once I felt the bottom" (Michaelsen, pp. 107, 108).

During the *next day (Sept. 6th)* conditions were, if anything, worse, as shown by the following testimony:

"Q. What were the conditions the following day: Did you go through the next day?

"A. Yes, we went all day. The wind was increasing as we came along, and the sea was increasing; there was a strong northwest wind and sea.

"Q. You heard what Mr. Rosenthal and Mr. Davenport had to say about what you said to them concerning the light?

"A. Yes, I heard what they said.

"Q. What, if anything, have you to say about that testimony and that conversation?

"A. I told Mr. Davenport that the weather did not permit me to relight the light, that was why I did not have it lit. Mr. Davenport knows very well I told him so. The mate and the chief engineer stood on the poop when I told Mr. Rosenthal the same thing, that the weather did not permit us to relight the light. If I had any chance to relight her, I would certainly have relit her in safety to myself, but I did not want to drown anybody to relight the light; I would not permit anybody to do that" (pp. 109, 110).

"Q. You considered that it was too rough during the whole of that day to put down your working boat?

"A. Yes, sir" (p. 127).

"Q. You say the wind and sea increased; what do you mean, from what time to what time?

(A. Hultgreen) "A. After we crossed the bar, we had a westerly swell coming in toward the bar, and as soon as we got clear of the bell buoy and shaped our course toward the southard, we caught the wind, a strong northwest wind.

"Q. And it kept on increasing during the night?

"A. Yes, sir.

"Q. How about the following day?

"A. Well, it was strong the whole day. It was strong all the way down, and in the afternoon before we lost the barge it increased a good deal, as it most always does near Cape Mendocino and Point Gorda; with northwest weather there is almost always a stronger breeze blowing a few miles to the northward and a few miles to the southward of those points" (Hultgreen, pp. 143, 144).

"Q. What have you to say concerning the condition of the sea and the behavior of the barge during the day preceding her loss?

(K. Knudson). "A. Well, it was pretty rough; that is all I have to say. There was a pretty strong wind and a high sea going. That is the only thing I can say about the weather and the wind" (Knudson, pp. 156, 157).

"Q. What was the condition of the sea from that time on up to the time the barge was lost?

(Rudolph Sanne) "A. The next day it was still rough, blowing pretty good in the morning. We had a watch on deck in the morning, from 8 to 12—we had a watch below, and in fact I had a watch on deck again, and I was working aft, and I was looking at the barge, and she was more than tossing around there, and it was impossible to get a boat alongside the barge at that time.

"Q. You were down below from what time do you say?

"A. From 8 to 12 in the morning.

"Q. So you don't know anything about the conditions at that time?

"A. No, but it was blowing in the morning, and it was blowing when I came on deck again at 12 o'clock, so it must have been blowing all the time" (Sanne, p. 162).

The foregoing uncontradicted testimony should be convincing. But it might further be pointed out that the barge was 86 feet long by 36 feet wide by 8 feet deep (p. 81). She was flat like a table, except that her hatches rose 14 inches from the deck, but these hatches were 10 feet from either side of the barge. She had about 6 feet free-board and had nothing on her to grasp (pp. 78, 79). She was light and tossed hither and thither on the waves (p. 109). The danger of attempting to board such a scow in a heavy sea and wind must be apparent.

The testimony which counsel for appellants summarize on pages 16 and 17 of their brief to meet the foregoing evidence is pitifully weak and inadequate. The fact that the steamer "Hardy" made 179 miles on September 6th was to be expected in view of the fact that she was running before the wind, and that there was a following sea. The fact that the barge was not water-logged when Captain Brennan of the "Watson" saw her is of no consequence. The barge was flush decked and her hatches were battened down (p. 79). She rode light and it was almost impossible for water to get into her. It wasn't until

after the barge had run ashore and been damaged that she became water-logged. The fact that the "Brunswick," when bringing her down from the place where she had run aground, succeeded in picking her up when the hawser broke the second time is beside the mark, for, as the lower court ruled, in order to go into that matter it would be necessary to investigate all the conditions existing when the "Brunswick" was towing the barge. Besides, the barge was water-logged when the "Brunswick" was towing her and it is obvious that it was infinitely easier to get alongside of her in that condition than when the "Hardy" was towing her. When the barge was water-logged she could not jump and toss about; the water would run to one end and hold her. As Captain Brennan on behalf of appellants testified:

> "If she had water in her, one end of her would go down; when she lifts the water will go to one end, and she is loggy and slow" (p. 57).

Again the statement of Captain Brennan that he could have boarded the barge when he saw her is not at all prejudicial, for the Captain also testified:

> "At the time I passed her, the waves were not big at all; she was just riding along nice and smooth. *There had been* (*a heavy sea*) *all night,* but I told you at that time the sea was some better; it was in better shape then. There was not much wind at the time. *The wind had been blowing up until midnight around Point Arena,* but it died down that morning, and it freshened up a little bit again after we came up the coast" (p 57).

Finally the testimony of Captain Self that he found the weather comparatively calm on his voyage south from Coos Bay to San Francisco is obviously irrelevant, for he left Coos Bay 16 hours after the "Hardy," and it is well known that a few miles at sea may bring entirely different conditions. As appellants' witness, Captain Britt, said:

> "Q. Mr. Britt, do you think that your observations at Coos Bay would throw much light on the condition of the sea at Point Gorda, on the California coast?
>
> "A. No, I do not. The weather conditions may be entirely different there at the same time" (p. 28).

We submit that the evidence in this case shows that Captain Michaelsen was not negligent in the slightest degree in not relighting the lamp, either at the bar or during the following day. The size of the hawser and the smallness and riding qualities of the barge justified him in assuming that there was no danger of the barge breaking loose. The fact that the barge was flush-decked with a 6-foot freeboard and no projection to grasp; the fact that the tow rode light on the seas and tossed about; the danger at the bar, and the following wind and waves at sea, all made it dangerous and inadvisable to risk the men's lives in a small boat; especially when there did not seem any urgent need for taking such risks. In addition to the usual watch a man was kept stationed at the stern to watch the barge (pp. 110, 111), and even

in the darkness her presence could be ascertained by the foam (pp. 111, 128, 145, 160). A light known as an anchor or riding light was put in the rigging to warn other vessels not to come too near. Orders were left to blow the danger whistle if any craft approached (p. 110). In fact, it seems to us that everything was done in this matter by Captain Michaelsen that prudence and good seamanship would dictate. We do not believe that the failure to relight the lamp was a proximate cause of the loss of the barge; but if it was, we submit that no charge of negligence against Captain Michaelsen for not relighting the lamp can be sustained.

DID APPELLEES FAIL TO DISCOVER THAT THE BARGE WAS ADRIFT AS SOON AS SHE SHOULD?

Counsel for appellants contend that the "Hardy" failed to discover the fact that the barge was adrift as soon as she should and thereby lost her best chances of locating and finding the tow. This contention is so little supported by the testimony as to hardly merit a reply. However, we will for the convenience of the Court gather together here some of the testimony on this phase of the case.

CAPTAIN HANS MICHAELSEN.

"Q. Now, Captain, on the way down, what if any watch did you have set on the barge?

"A. As usual; we had the usual men, besides an extra man on the poop looking out for the tow,

especially as we had no light. I left orders to the men on the bridge to blow a danger whistle if anything approached us from the stern, and in addition I hung up an anchor light, or what we call a riding light, on the main boom aloft to attract attention to keep away. That is the next best thing we could do under the circumstances, because I could not get a chance to get to the barge.

"Q. This poop deck you speak of, where you had a watch on the barge, that is on the stern of the vessel, is it not?

"A. Yes, sir.

"Q. And besides that you had your regular watch on the ship?

"A. Yes, sir.

"Q. Was there a watch on that poop at the time that you lost her?

"A. Yes.

"Q. I presume you were not on deck at that time, were you?

"A. I went below at ten o'clock. I went to bed at ten o'clock at night, and left my order as usual, to keep a good look-out for the tow and the ship and the steering, and to let me know if anything occurred.

"Q. The first you knew of it was when a report was brought to you?

"A. The first report I got was at twelve o'clock; the second officer reported at twelve o'clock that everything was fine, that the sea and wind were about the same, and that the tow was there, and everything was O. K. At 12:40 the first mate came and called me and said that we had lost the tow. It was a very dark and cloudy night. He was looking for a few minutes, between him and the man that was aft looking out; he said he was looking for a couple of minutes, he felt sure that there was no barge behind us, because he could not see the foam, and he came right and

called me, and he said he felt satisfied we lost the tow" (pp. 110, 111).

1ST OFFICER A. HULTGREEN.

"Q. Were you on watch at the time the barge was lost?

"A. Yes, sir.

"Q. How many men were on watch, or who was on watch; what watch was there?

"A. There was the regular watch, a man at the wheel and a man at the look-out, and one man specially looking out for the barge.

"Q. Where was he stationed?

"A. He was stationed aft.

"Q. Where?

"A. On the poop.

"Q. Does her poop run up to the stern?

"A. The poop is right aft the after deck. My position up on the bridge is above it, on top of the house, where I have a view right astern and all around.

"Q. I understand that, but what I want to get at is, her poop is aft, and it runs up flush with the stern of the vessel, does it?

"A. Yes, sir, there is just a rail around the stern.

"Q. The line of the tow came up over the poop, did it not?

"A. Yes, sir, and made fast to the bitt.

"Q. And on that poop is where the man was watching the tow?

"A. Yes, sir.

"Q. And your position was on the bridge?

"A. Yes, sir.

"Q. And you could see the tow from the bridge also?

"A. I had a clear view, I could see the tow from the bridge.

"Q. What could you see of the tow during the night, to ascertain whether she was there or not?

"A. When I came up at twelve o'clock it was a very dark and cloudy night, but otherwise seemed to be pretty clear, but it was very dark, but *you could plainly see the milk-white foam, and the forepart of the barge was riding over the sea; you could also see by the hawser.* I relieved the second officer and made myself sure that the barge was there.

"Q. Previously to the loss of the barge, what, if anything, did you do about going down and examining the tow-line?

"A. About twenty minutes past twelve I went down and had a look at the chock where the line went through to see that the chafing gear was all right, and at that time I plainly saw the barge astern. I went up on the bridge again, and I was walking up and down there looking ahead, and once in a while—once every minute or so—looking astern, taking a view all around, as we have to do, having charge of a ship on the watch; and at about twenty-five minutes to one, as near as I can recollect it was, I looked and I did not see the foam, I could not see the foam there; I thought perhaps it had run to the side, and the foam was ahead for a little while; sometimes it would take a sheer on the sea and you could not see the foam so plain. So I was looking very sharp for the barge for a minute or so, and I sung out to the man who was stationed there to look out for the barge, 'Can you see the light—I mean, can you see the barge?' He said, 'No.' I took the glasses and I looked through the glasses and I didn't see no sign of her, and so I called the master right then and there. As soon as the master was called, I called the watch on the deck, and they came aft and we started to heave in the hawser, and we took the hawser through the capstan. Meanwhile

the captain was up and the ship was stopped. As soon as the hawser was in, I went up to the bridge to the captain and reported the hawser in, and he ordered the helm hard aport and we hove her to" (pp. 144, 145, 146).

HENRY PREEGEN (sailor).

"Q. You were one of the crew of the 'Hardy,' were you?

"A. I was at that time, just on that trip.

"Q. Where were you stationed?

"A. I was aft on the poop-deck there.

"Q. What were you doing?

"A. Just stationed there specially to watch out for the barge.

"Q. How long had you been there?

"A. From 6 to 12.

"Q. From 6 to 12?

"A. That night, yes.

"Q. And at twelve o'clock were you relieved?

"A. I was relieved at twelve o'clock.

"Q. Who relieved you?

"A. Well, Joe—I don't know his last name; he was a sailor; I don't know his last name.

"Q. He is not on the 'Hardy' now?

"A. No, I don't think he is.

"Q. During the time you were watching the barge, how did you tell she was there?

"A. By the foam and then every once in a while you could get a glimpse of it. You can kind of see the form of it riding up and down, you could see the form of the vessel and the way she was riding she would naturally throw some foam" (pp. 159, 160).

"THE COURT—Q. You did not see whether or not the barge was there when you went off watch?

"A. It was there, yes sir" (p. 161).

In the face of the foregoing testimony how absurd and futile is the attempt of counsel for appellants to make it appear that the barge must have been lost for hours before the fact became known to the officers of the "Hardy" because Mr. Davenport testified that the hawser to him had the appearance of having been towed in the water a very long time. Equally weak is the attempt of counsel to support their contention in the matter by saying that claimants did not put on the stand as witnesses in their behalf the sailor who was on watch at the stern when the barge broke loose, and also the engineer who was on duty at the time. The sailor who was on watch at the time the hawser parted was not with the "Hardy" when the trial took place (p. 160), and the engineer in question was busy on board ship during the trial and could not leave because under the law the "Hardy" would then have to stop discharging (p. 159). If counsel for appellants considered that the testimony of these men would be favorable to themselves, why did they not subpoena them on their own behalf, or take their depositions? No demand was made at the trial that these men be called as witnesses. To argue that they would have testified in favor of appellants because appellees did not consider their case in this regard required any further *cumulative* evidence, shows how utterly weak and without foundation is this third charge of negligence on the part of appellants.

DID APPELLEES NEGLIGENTLY ABANDON THE BARGE?

The final contention made by appellants is that the "Hardy" did not search sufficiently for the barge and "abandoned her under the most reprehensible circumstances." Let us see if there is any justification for this charge.

The barge broke adrift at about 12:40 A. M. on September 7th, 1913, and as soon as the hawser was drawn in, which took about twenty minutes (p. 140), the "Hardy," about 1 A. M., was hove to—that is, she turned about and headed northward (p. 140). This was a very dangerous operation. The steamer "Hardy" was carrying a very heavy deck load of lumber. There was a heavy northwest wind and sea. At the moment that the "Hardy" was turned sideways to this wind and sea there was very grave danger that she would lose her housing and deck-load, and might even be capsized. Captain Michaelsen took this chance and through good seamanship succeeded. She proceeded northwest by north against a strong wind and heavy sea at half speed until daylight, that is, until about 6 A. M. (pp. 133, 134). It was necessary to run the ship northward, for this was the only way of holding the ship. She could not lie sideways to wind and sea, for then she would be, as just pointed out, in constant danger of losing her housing and cargo, and even of capsizing. Hence she had to proceed either northward or southward. As Captain Michaelsen said:

"Q. Suppose when it was foggy you hove to and waited, you could have saved fuel oil in that way, could you not?

"A. Well, I could not lay on the ocean with a northwest sea and wind without using my engine.

"Q. You could have gone very slowly?

"A. I would not do it as master of a vessel. First of all, with a loaded vessel, she will go sideways and I will either lose my housing or my deckload. The only way of holding the vessel is either to hold her before it or put the bow on the sea. That is according to my experience. I have had experience since I was thirteen years old. I never saw anybody stop a vessel on the ocean with a sea and wind" (p. 136).

It would not do to run the ship south even at her slowest speed, for she would run away from the barge. The only thing to do was to proceed north trying to see her if possible in the darkness, and then turn south in the morning after it was certain that the "Hardy" was north of the barge, and come up behind her in the daylight. This course was followed by the "Hardy." *A look-out for the barge was kept throughout the entire night,* but it was not expected that she could be seen, and it would have been almost impossible to have boarded her. In fact, it was as important to keep a sharp lookout in order to avoid running into the barge as it was to find her (p. 134). At daylight, when north of where he lost the barge, Captain Michaelsen turned and ran in a southerly direction. He zig-zagged in and out, keeping a sharp lookout for the barge (p. 135). The crew were all

looking for the barge; the captain went up in the rigging with glasses every time the fog lifted (p. 148). Captain Michaelsen figured "the barge would drift in towards shore, making south" (p. 139); or in other words, would drift about "southeast by east" (p. 139). And in passing it might be said that the accuracy of the Captain's judgment is shown by the fact that Captain Michaelsen came up behind her and apparently only missed her by being about a mile or so too far in towards shore (pp. 52, 138). These efforts were kept up continuously for hours from 6 A. M. to 11:15 A. M., but without success. The trouble was that a drifting fog had set in, which would lift at intervals only to return (p. 135). This was the sort of fog that often accompanies a northwest wind (p. 135). As Captain Michaelsen said: "at times it is pretty clear and you can see a little ways, and at other times it sets in foggy again."

It was at about 8:30 A. M. that the steamer "Watson" passed the "Hardy" about a mile inside the latter. The fog had lifted to some extent about 8 A. M. and remained so for about half an hour (p. 135). Captain Michaelsen, however, was not able to see the "Watson" a mile ahead of him. After the "Watson" had passed the "Hardy" about two miles, Captain Michaelsen saw her for about five minutes, and then the fog set in again (p. 135), and she was out of sight (p. 114). It was of course far more difficult to see the barge than to see the "Watson"

(p. 113). The barge had only about 5 or 6 feet freeboard, and she would lie in between the swells (pp. 113, 114). Often it is only possible to see the masts even of vessels. The fact that the "Watson" had white painted houses made it easier to see her (p. 114). The density of the fog is shown by the fact that though Captain Michaelsen saw the "Watson," a larger ship than the "Hardy," the officers of the "Watson" did not see the "Hardy" (p. 57), which was formerly known as the "Grace Dollar." Counsel for appellants would make it appear that there was no fog on September 7th, but the testimony of Captain Brennan of the "Watson," a witness for appellants, supported the testimony of Captain Michaelsen. The log of the "Watson" showed that fog had set in at 7:50 A. M. (p. 58). And the "Watson" was miles south of the "Hardy," from whose direction the fog was drifting. So the fog would have reached the steamer "Hardy" first.

The "Hardy" continued zig-zagging south looking for the barge until 11:15 A. M. At that time she actually was some miles south of the barge. It will be remembered that the "Watson" saw the barge at 7:05 A. M. (p. 59), and that at that time there was no fog in the vicinity of the "Watson." The "Watson" lost about twenty minutes in going out of her way to look at the barge (p. 59). At 8:30 A. M. the "Watson" had passed the "Hardy" (p. 113), so that about one hour after the "Watson" saw the barge

she passed the "Hardy." The record does not disclose at what speed the "Watson" was traveling. The only evidence on the subject is the statement of Captain Michaelsen that it took the "Watson" about 15 minutes to go about 3 miles (p. 135). At that rate the barge was about twelve miles south of the "Hardy" when the "Watson" was seen. There can be no doubt therefore that the "Hardy" was some miles south of the barge at 11:15 A. M.

We think that the foregoing summary of the evidence is convincing that the "Hardy" made a careful search for the barge and did everything she could to find her from the time she was lost at 12:40 A. M. to 11:15 A. M. on September 7th. But counsel for appellants contend that the "Hardy" should have continued searching after 11:15 A. M., and that she was grossly negligent in then giving up the search. Let us see if the evidence supports the charge.

At 11:15 A. M. Captain Michaelsen had about 60 barrels of fuel oil left (pp. 137, 155). Of this amount about five barrels were not available, because the suction pipes would not go down to the bottom of the tank (p. 156). These 55 available barrels were sufficient to take him in to San Francisco and leave him 15 barrels on which to rely in case of emergency, such as a southwest storm, which is not at all infrequent at that time of the year. And indeed Captain Michaelsen had just 20 barrels left, of which 15 were available, when he reached San Francisco (p. 114).

And it would not have been safe to have attempted the remainder of the voyage with less than a *margin* of 15 barrels. As the engineer of the "Hardy," K. Knudson, testified:

> "Q. So that the most you would have available would be about 15 barrels?
> "A. Yes, sir, something like that.
> "Q. What would you consider with regard to the safety of the vessel, as to the reasonableness of coming in or attempting to make port with a less surplus than that?
> "A. Well, I would not take the chance of having any less in case of a head wind and sea, I would want something to work on.
> "Q. You don't think it would be good seamanship to do that, is that the idea?
> "A. That is the idea" (p. 156—see also p. 115).

At 11:15 A. M. Captain Michaelsen was certain that he was south of the barge, which undoubtedly was the case, as we have previously shown. But he had absolutely no way of telling how far south of her he was. The currents might have taken her further east or west than he had figured, or he might have passed her hours before in the early morning fog. The fog was still on. Counsel for libelants would make it appear that at 11:15 A. M. the weather was entirely clear, and he relies on the following testimony of Captain Michaelsen:

> "Q. Did it begin to clear at 11:15 a. m. as noted in the log?
> "A. At 11:15 a. m. it was clearing, that is, you could not call it clear, but it is what we would

call clear enough that we did not have to blow our steam whistle.

"Q. It was cleared up?

"A. It was clear enough so that we did not have to blow our steam whistle. We could see for a mile or two around us.

"Q. That was the very time you started back to San Francisco, was it not?

"A. That was the very time" (p. 136).

We submit that the foregoing testimony shows that the "Hardy" was still surrounded by fog. Captain Michaelsen could not see more than a mile or two around him. To anyone who is at all familiar with the sea it would be ridiculous to maintain that weather is clear when you can see at the most two miles. The drifting fog was still on, and it might at any time set in more heavily. In a limited time the chance was very slim of finding a barge adrift on the ocean when the range of vision was confined to a distance of two miles.

Every mile to the northward meant using oil for two miles. At that rate it would not be long before the margin of oil on the "Hardy" would be consumed. In that event, if a storm from the south should arise, the speed of the "Hardy" would be so retarded by wind and sea that her fuel oil would be consumed before she reached port. She would then lose all headway, and would be sidewise to wind and sea, in the trough of the waves, in imminent danger of losing her housing and deck cargo, and possibly of being capsized. By reducing his margin

of fuel oil in spending further time in search for the barge, Captain Michaelsen would be risking his steamer, her cargo, and the lives of his crew.

Such was the situation that confronted Captain Michaelsen at 11:15 A. M. on the morning of the 7th of September. Should be continue his search longer, or was it the part of wisdom to continue south? Did the chance of finding the barge warrant the risk involved? These were the questions that Captain Michaelsen was called upon to answer. He had searched diligently for eleven hours without success, and he was still confronted with the same weather conditions that had contributed to his failure to find the barge. He had absolutely no means of knowing whether the barge was north, east, or west of him. His engineer had advised him that he had then but a safe margin left on which to reach San Francisco. In view of the foregoing it is obvious how little foundation there is for appellants' charge that Captain Michaelsen was negligent in discontinuing the search. The tug was only bound to employ those means of rescuing the barge which were consistent with her own safety (38 *Cyc.*, 566; *"The Mosher,"* 17 Fed. Cas. No. 9874). If anything further were needed, in addition to the facts already outlined, to demonstrate how earnest and determined Captain Michaelsen was in his efforts to find the barge, we would call the Court's attention to the risk and responsibility which Captain Michaelsen assumed

when a few moments after the hawser parted, in the teeth of a northwest wind and heavy sea, with a heavy deck-load, he turned his ship about and steered north. We contend that there is absolutely no basis for the charge of negligence against Captain Michaelsen. On the contrary we maintain that in these circumstances the decision of Captain Michaelsen to proceed south was not only proper, but was the only decision which seamanship and good judgment would justify. Captain Michaelsen owed a duty not only to the owners of the barge, but also to the owners of the ship and her cargo. And he owed even a greater duty to his crew.

But, say counsel for appellants, though this may be so, still respondent was negligent in not having more oil on board. There is no merit in such a contention. The "Hardy" had been making the trip between Coos Bay and San Francisco week in and week out for months and months, and the slowest voyage she had ever made in the heaviest winds and seas she had ever encountered had been made in 72 hours (p. 137). The "Hardy" uses 42 barrels of fuel oil every 24 hours, or 1¾ barrels every hour (p. 137). Hence even on the unusual voyage which required 72 hours, 126 barrels of oil was sufficient. And the voyage involved in the action was made in 61 hours (Ans. to Inter. 6 on p. 21), and would have been made in 50 hours, if 11 hours had not been lost in searching for the barge. Yet the "Hardy" had at least 134 barrels

of oil on board when she left Coos Bay, or 8 more barrels than experience had shown would be required by her slowest trip. There is no direct testimony as to this fact, but the evidence demonstrates that such must have been the case. At 11:15 A. M., September 7th, the "Hardy" had been at sea 42¼ hours, and though from 12:40 A. M. to 6 A. M. on September 7th she had been going northward at only half speed, still she had been bucking wind and tide which would greatly increase the oil consumption (p. 137). At the rate of 42 barrels per day there had therefore been consumed up to that time about 74 barrels. At that time the engineer, K. Knudson, sounded the tanks and found that there still remained about 60 barrels of fuel oil (pp. 137, 155). Hence the "Hardy" must have had on board when she left Coos Bay at least 134 barrels of fuel oil. And this amount, as before stated, was more than she had required on her slowest trip. The fact that she was towing a barge made no difference. Appellants themselves testified that the barge was easy to tow (p. 68), and the engineer of the "Hardy" testified that the barge "didn't make any difference to the speed" of the ship (p. 154). This testimony is cited with approval by counsel for appellants (App. Br., pp. 16, 25). Counsel for appellants would make it appear that Captain Michaelsen stated that he considered it prudent to carry between 260 to 280 barrels of fuel oil on the single trip from Coos Bay to San Francisco. Captain Michael-

sen was referring to the round trip from San Francisco to Coos Bay and back again. That such was the case is shown by the fact that the chief engineer testified that he considered 130 to 140 barrels of oil sufficient to carry on the voyage from Coos Bay to San Francisco (p.158). This is just half the amount mentioned by the captain and the engineer and master could not reasonably be so far apart in their estimates. Obviously the master had in mind the round trip. Both master and engineer then thought it was prudent to carry between 130 to 140 barrels on a single trip, and that was done on the voyage when the barge was lost. The "Hardy" was therefore perfectly seaworthy when she left Coos Bay. There is nothing inconsistent in the statement that the oil supply made it prudent to discontinue the search at 11:15 A. M. on September 7th, and the statement that the "Hardy" had ample oil on board when she left Coos Bay on September 5th at 5 P. M. The "Hardy" at 11:15 A. M. had *already* spent 11¼ hours searching for the barge. *That fact alone showed that she carried a safe margin of oil. It was the fact (and the very fact that counsel for appellants calmly ignore) that there were still 145 miles to go* (p. 56) *and that emergencies might still arise, that made it necessary for the "Hardy" to proceed for home.* The "Hardy" had enough oil to last her at least 76 hours when she started, and experience had shown that she could make the trip in 72 hours under the worst conditions,

and the tow made no difference in her speed. We fail, therefore, to see wherein the "Hardy" was unseaworthy, or wherein her captain or engineer was careless or negligent.*

Up to this point we have met appellants on their own ground. We have met their various contentions that appellees were negligent, and have endeavored to show that the officers of the "Hardy" were not only *not* negligent, but that in the problems before them they exercised sound judgment and did what was the proper and prudent thing to do. And in passing we might point out that the observation made by the Court in *"The Czarina,"* 112 Fed., 541 (see infra, p.), is equally applicable here, namely, that appellants totally failed to produce any witness to testify that the master had been negligent and incompetent. It seems to us that if Captain Michaelsen was as careless and incompetent as appellants would make us believe, that there should have been no difficulty in obtaining seafaring men to declare that Captain Michaelsen did not act under the circumstances as a prudent navigator would have done. But we now wish to urge upon the Court that if now, looking

* Counsel criticizes the "Hardy" for not taking the tow to Fort Bragg or going there for help. There is absolutely nothing in the record to show that the "Hardy" could have gone to Fort Bragg or if she could have got into that place that she could there have obtained fuel oil or assistance; or that oil or assistance, if obtainable, could have been had before the barge went ashore. There is not a word of evidence in the record touching on the question of the "Hardy" going to Fort Bragg. That was a matter on which evidence, if they desired to raise it, should have been offered by counsel at the trial. Obviously, with no evidence on the subject before this Court, it can not be raised in the briefs.

back after the episode is all over, it should appear that Captain Michaelsen erred in any one or more of his decisions, that fact does not impute negligence to appellees. There is a vast difference between deciding upon a course of action at the time the emergency presents itself and in seeing what might better have been done after the emergency is over. It is easy to argue that the lamp should have been relit after the 10-inch hawser broke in the dark and a fog set in, even though there was a heavy sea and wind. It is easy to maintain that the "Hardy" should have continued searching for the barge some time longer when it is known from Captain Brennan of the "Watson" just where the barge was tossing. A tug will not be held liable for a mistake or an error of judgment when the course pursued was one that a competent navigator might reasonably pursue. As stated in the article on Towage, 38 *Cyc.*, 567:

> "Where the master of a tug is an experienced and competent man, much must be left, as occasion arises, to his judgment and discretion in the management of the tow; and a mere error of judgment on his part will not render the tug liable for the loss of her tow, unless the error was so gross that it would not have been made by a master of ordinary prudence and judgment."

The Startle, 115 Fed., 555;
The Fred. E. Ives, 169 Fed., 902;
The Czarina, 112 Fed., 541;

The Britannia, 140 Fed., 985;
The Covington, 128 Fed., 788;
The Garden City, 127 Fed., 298;
The E. Luckenbach, 109 Fed., 487;
The Taurus, 95 Fed., 699.

As said by the Court in *The Wilhelm,* 47 Fed., 89:

> "Hypercritical scrutiny into the conduct of the navigation, after the event of the disaster and in the light of that which has happened, is not the test of negligence, but prudent judgment is to be tested by the circumstances as they appeared to the master at the time he was called to act, and not as they appear to the Court after more critical scrutiny than the master could have given to them."

Or as stated by the Court in *The Hercules,* 73 Fed., 255:

> "A tug is not to be held liable for the loss of a tow merely because her master, in an emergency, did not do precisely what, after the event, others may think would have been best. If he acted with an honest intent to do his duty, and exercised the reasonable discretion of an experienced master, the tug should be exonerated."

In *"The Czarina,"* 112 Fed., 541 (District Court, N. D. of Cal.), decided by Judge De Haven, the facts are very similar to those in this action. In a northwest wind and sea the tug lost its tow by the breaking of the hawser a few miles south of where the "Hardy" lost the barge. The captain of the tug did not believe it was prudent to attempt to board the

tow in such a sea in order to refasten the hawser, and he considered it dangerous to his ship to lie alongside of the tow during the night. He therefore abandoned the tow and went to Point Arena. The next day when he returned to look for the tow a heavy fog had set in and he could not find the tow. It was contended that the tug was negligent in abandoning the tow and not staying in the vicinity of the tow during the night and keeping her in sight until the wind and sea went down. Judge De Haven said:

> "Undoubtedly, when the hawser parted it devolved upon the master of the 'Czarina' to exercise his judgment as to what ought to be done,—whether to stand by the raft so long as he could do so with safety to his vessel, or to proceed immediately to the shore. The condition which confronted him was this: A valuable raft was adrift, a strong northwest wind blowing, and the condition of the sea was such that, in his opinion, the raft could not be recovered during the day. He did not think it safe to remain near it during the night, or that, if he should attempt to do so, he would be able to keep it in sight. Under these circumstances, it was his judgment that he could render no service to the raft by remaining with it during the day, and that the best course to pursue was to immediately communicate with his owners, in San Francisco. In acting upon this determination, I do not think it can be said that he committed any error,—much less, a gross error of judgment,—and there is nothing in the evidence which tends to show that, if a different course had been pursued, the raft could have been kept in sight during the night, or that it probably would have been recovered sooner than it was. In the presence of weather and sea

conditions such as then prevailed, a master of ordinary skill could certainly form a reasonable judgment upon the question of whether it was probable that the wind would so moderate during the day as to make it possible to pick up the raft before night; and it certainly has not been shown that the master of the 'Czarina' was mistaken in the judgment which he formed in relation to that matter. *Upon the question whether a prudent master, surrounded by the same circumstances, would have pursued the same course, the evidence of experienced navigators would have been competent.* (*The Frederick E. Ives,* 25 Fed., 447.) *No witness of that character testified that the master of the 'Czarina,' in leaving the raft, did what a prudent and careful navigator would not have done under like conditions.* The raft, although a large body, only floated twelve feet above the water; it had no lights upon it; and, conceding that it would have been possible for the 'Czarina' to have kept so near to it during the night as to have held it constantly in view, to have done so would certainly have been attended with great danger. . . . It must be remembered that the 'Czarina' is not to be held to the responsibility of an insurer that the enterprise of towing the raft would be successful, and carried through without loss. Her obligation was to use ordinary care and diligence to bring the raft safely to San Francisco, and this obligation imposed upon her the duty to make proper efforts to recover it when the hawser parted, and for this purpose to stay by it so long as there was any reasonable probability that by so doing it could be saved. But the 'Czarina' cannot be held liable for the subsequent loss of a portion of the raft, before it was finally recovered, 'because the master in an emergency did not do precisely what, after the

event, others may think would have been best' (*The Hercules,* 19 C. C. A., 496, 73 Fed., 255)."

We submit that the case just cited, *"The Czarina,"* is conclusive in favor of respondent. If the abandonment of the tow in that case did not constitute negligence we fail to see how Captain Michaelsen's abandonment after a search of 11¼ hours constituted negligence. Both captains were confronted with similar problems, involving the safety of their ships, and it seems to us that the danger that presented itself to Captain Michaelsen was much more imminent, and that therefore if either committed any error that of the captain of the "Czarina" was much the greater.

In determining the question of negligence in this case this Court must not only give weight to the judgment of Captain Michaelsen, whose competency is not attacked, but it must also give consideration to the decision of the lower court. While the hearing before this Court is in the nature of a trial *de novo,* "the "rule has been well established in cases in admiralty "in this Court (U. S. Cir. Ct. of App., Ninth Cir.), "and, as we believe, in the Supreme Court of the "United States, that where objection to a decision is "that it is based upon a fact found by the lower "court upon conflicting testimony, or upon the testi- "mony of witnesses whose credibility is questioned, "the decision of the lower court will not be reversed "unless it clearly appears that the decision is against "the evidence" (Judge Morrow in *Jacobsen* vs. *Lewis, etc. Co.,* 112 Fed., 73).

See also:

1 *Corpus Juris.*, p. 1350, notes 18 and 19.

On every distinct charge of negligence made by appellants there is a conflict of testimony unless when appellants produced no testimony at all. Every charge of negligence made in appellants' opening brief in this Court was pressed in their brief in the lower court. Counsel attacked in the lower court just as virulently as they have in their brief in this Court the veracity and integrity of appellees' witnesses. In fact, the brief filed by counsel in this Court is, with a few slight changes, the brief filed by them in the lower court. With every point presented to it that has been urged here the lower court decided on the conflicting testimony in favor of appellees, and, being in a position to judge (most of the witnesses having appeared before it), by rendering its decision exonerating appellees from every charge of negligence made, expressed its faith in the credibility and integrity of the witnesses for appellees.

Upon the judgment of a competent master and the findings of the lower court upon a mass of conflicting testimony we might well urge this Court to follow its established rule and affirm the decree of the lower court. But we do not rest our case on the proposition that appellees are not liable for an error of judgment of a competent master, or upon the finality of the findings of the lower court. Our position is that a

close study of the case upon its merits, of the situation that confronted Captain Michaelsen from the moment the light went out until he finally gave up the search, will clearly exonerate appellees from all blame for the loss of the tow. We believe that the evidence has not only shown that Captain Michaelsen was not guilty of any negligence in not relighting the lamp and in discontinuing the search, but that in the situation which confronted him he took the only course which a competent navigator would take who had a proper appreciation of the responsibility which lay upon him to protect and preserve his cargo, his ship and the lives of his crew.

Respectfully submitted.

W. S. ANDREWS,
Proctor for Appellees.